DOI:
10.1093/jnlids/idx021

Document Version
Peer reviewed version

Shakespearean Legal Thought in International Dispute Settlement

Thomas Schultz* and François Ost**

Abstract: In this article, the authors examine the contributions of Shakespearean legal thought to our understanding of core aspects of international dispute settlement. These aspects include: the sweeping role of masks in law and in the resolution of disputes; the construction and deconstruction of authority; the purpose of law in arousing desire and thus action; the limits in recognizing informal international law as law; the benefits of exaggeration; the problematic ambition of adjudicators; the key role of passion, against rationality, in understanding and dealing with international disputes; the decision-making resources to be found in logics of life; exercising measure in the enforcement and reach of law; remembering that law deals with human beings in our quest for law's purity and systematic organization; resisting single-mindedness; the relevance of a dialectic form of proportionality; and the inescapable need to embrace uncertainty. The authors also discuss the general relevance of law & literature, and law & theatre, for all manner of legal professionals and review Shakespeare's own legal background and thus his a priori ability to deal with legal matters.

Introduction

Thinking outside the box may be a voguish credo, but we lawyers, academic or not, have a tendency to embrace it more often as a figure of speech than as an actual principle of action. Interdisciplinary thinking may be a constant mantra, but less often is it clear what that really means. And its actual practice is yet rarer. So 'Shakespeare and International Dispute Settlement' may appear to be quite a bit outside

* King's College London, Dickson Poon School of Law; Graduate Institute of International and Development Studies, Geneva, Department of International Law.
** Saint-Louis University, Brussels, Faculty of Law.

the box, to the point that the box of international dispute settlement seems forgotten entirely. The late International Court of Justice judge Gerald Fitzmaurice would probably be all too happy to concur: 'the real fault of the lawyers', he opined, 'probably is that they have not, as lawyers, been single-minded enough, and have not resisted the temptation to stray into other fields.'[1] Lawyers, he thought, should really deal with just law.

For indeed, what could international dispute settlement scholars possibly learn from Shakespeare about their field? Should arbitration practitioners, should policy-makers in this area venture out into this wild territory?

Fitzmaurice would insist, shake his head no, and try to drive the point home with this cute logical conundrum: 'the value of the legal element depends on its being free of other elements or it ceases to be legal.'[2]

Ironically enough, arguments like this would disappear in a puff of logic were it not for the rescuing force of theatricalities. The validity and persuasiveness of such arguments owe evidently less to rules of critical thinking than to rules of rhetoric. Theatre helps us understand these rules particularly well, in a way that goes far beyond the ordinary focus in rhetoric on the knockout delectation of a well-turned phrase.

Law and theatre, in truth, are intimately linked.

They share some of the same societal objectives. Both for instance involve the portrayal of and collective engagement with various forms of human dignity, in the form of providing for catharsis for example. The day theatres and courtrooms will close, civil wars will most likely erupt.

They share some of the same rhetorical tricks. Both for instance depart from rules of critical thinking and logical argumentation, which would elsewhere be considered argumentative fallacies. In fact, the art of some of the main protagonists of both worlds, the actor and the advocate, have much in common.

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[1] Gerald Fitzmaurice, 'The United Nations and the Rule of Law' 38 *Transactions of the Grotius Society* 135 (1953) 142.

[2] ibid, 140.

They share some of the same formal and contextual narrative requirements. Both demand narrative lucidity, reliability, and consistency, as well as simple socio-cultural embeddedness.[3]

They share certain aesthetic similarities. The things that make drama aesthetically pleasant resemble the things that make justice aesthetically pleasant. As Carol Chillington Rutter put it, the courtroom and the stage are both 'performative spaces'; they have always been spaces 'where stories were told and contested; where language was charged and words *worked*; where speech, embodied, was action and claims and counterclaims, equally weighted, hung in the air simultaneously; where the next entrance, the next witness might bring into play evidence to explode the entire narrative to date; where tragedy, comedy (and farce) were always potential'.[4] All in all, the stage and the courtroom have to meet some of the same demands and expectations, expressed by some of the same audiences.

The simple point is this: what makes a story a good story largely overlaps with what makes a judgment a good judgment, and what makers party submissions good. After all, judgments and party submissions are legal story; and legal stories are stories. As Daniel del Gobbo puts it, 'legal authors, like literary authors, are storytellers'.[5]

From this a further point follows: narratology – the study of narration, of storytelling – should naturally be highly informative for what is occasionally called 'judiciology' – the study of all things judicial. As Andrea Bianchi puts it, with many examples taken from the International Court of Justice, 'evaluat[ing] judgments through the lens of literary techniques and rhetorical tools' may prove surprisingly illuminating.[6] Then again, if the reflexes taught in law school are taken away, which are often limiting, it is in fact not surprising at all. The things that make a story unreliable (in the sense of implausible, un-relatable, etc.) tend to make decisions in adjudication unreliable too. And the same applies, again, to party submissions: as probably

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[3] Daniel Del Gobbo, 'Unreliable Narration in Law and Fiction' (2017) 30 *Canadian Journal of Law & Jurisprudence* 311.

[4] Carol Chillington Rutter, Foreword to Paul Raffield and Gary Watt (eds), *Shakespeare and the Law* (Hart 2008) vi.

[5] Del Gobbo, 'Unreliable Narration', 312.

[6] Andrea Bianchi, 'International Adjudication, Rhetoric and Storytelling' 9 *Journal of International Dispute Settlement* xxx (2018), [p 3 in PAP]

everyone who has every taught advocacy would confirm, the key idea is 'to give them a good story'. So the requirements of good lawyering in international dispute settlement simply bear remarkable, if often underestimated, similarities with the requirements of good narration.

And in turn this leads to another point. If we want to understand conflicts and power struggles within a legal field, à la Marx or Bourdieu, then narratology may again help. As Bianchi explains, it helps us 'understand who are those who weave the narrative thread, what are their ideas and beliefs, how they perceive their role and perform their function'[7] – in sum, it helps us perceive who writes the story and why.

So law and theatre and intimately linked. There is, then, a patent interest in noticing how these links can illuminate our understanding of legal questions. Beyond that and more specifically, an approach so strongly rooted in the humanities, so attuned to one of humanities' key modes of expression – storytelling – can provide something critical: context and thought experiments.

Context and thought experiments are the most obvious analytical lenses Shakespeare provides to international dispute settlement scholars, practitioners, and policymakers. Social, axiological, rhetorical, historical, ethnographic, anthropological, even educational context. Context for the box outside which we want to think. Context that allows us to take a step back, to rise above the immediacy of the legal question posed by a case and the peremptory values that too promptly offer themselves for its resolution, like an unimaginative hand-raising student. Context to put things into historical perspective too.

Seriously, thinking about law with no interest for its context only provokes the sort of cynical remark offered by the late constitutional lawyer Thomas Reed Powell: 'If you have a mind that can think about something that is inextricably connected with something else, without thinking about the something else, then you have The Legal Mind.'[8] Would any good lawyer really want to have such a mind? It would be a mind closed to the humanities, impervious to culture, unconnected to our civilization's intellectual achievements.

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[7] ibid, [p 3 in PAP].

[8] Quoted by Pierre Schlag, *The Enchantment of Reason* (Duke University Press 1998) 121.

Yet international dispute settlement is indeed habitually taught, practiced, and thought of as an almost purely technical field. Quite often it illustrates Andrea Bianchi's general lament about international law: 'there is hardly any awareness of the discipline's theoretical presuppositions amongst practicing international lawyers'; it has 'been lacking in reflexivity and intellectual questioning for a long time'; its leaders 'are not particularly inclined to ask questions'.[9] International dispute settlement is usually understood to be a subject-matter focused on procedural technicalities and black letter law intricacies. It is routinely portrayed, not entirely without self-interest, as the exclusive preserve of experts and specialists.

In reality its nature makes it anything but an autopoietic field. What could be more fundamentally, more widely human than to resolve disagreements between people or their representatives, from minor personal quarrels to full-blown armed conflicts, so that they can continue to live together? As Gary Watt puts it, 'Dispute is the heart of human drama.'[10] Dispute settlement, at heart, is anything but a dry, technical, mechanical field.

If the entire enterprise we are engaging here had to be reduced to just one cursory take-home point, the point would be this: we need to re-center international dispute settlement as a human activity, above and beyond the humdrum of the technicalities of the applicable rules, to give dispute settlement a human context, to 'de-expertify' it, and to show what this concretely means – with all its contradictions, uncertainties, entangled perspectives, and doubts.

Shakespeare, of course, is special. After all, he is the best-selling fiction author of all time, with an estimated 4 billion copies of work sold. He probably is the one literary figure who mostly strongly marked the way we think about justice and law.[11] He is special enough, we believe, to stand out like a sore thumb against mostly any so-what disinterest among individuals centered on international dispute settlement. Probably, as a lawyer, one might get away with a

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[9] Andrea Bianchi, 'On Asking Questions: Philosophy and Theory in International Law' in Andrea Bianchi (ed.), *Theory and Philosophy of International Law* (Edward Elgar 2017) 1-2.

[10] Gary Watt, 'Sovereigns, Sterling and "Some bastards too!": Brexit seen from Shakespeare's King John' 9 *Journal of International Dispute Settlement* xxx (2018).

[11] An in-depth discussion of Shakespeare's many contributions to our understanding of law can be found in François Ost, *Shakespeare, la comédie de la Loi* (Michalon 2012).

limited interest in literature by arguing that it is the preserve of the humanist renaissance man. But which lawyer, frankly, could dignifiedly say that she has no interest, no time for the Bard of Avon? To make an arresting parallel, it is probably acceptable for most of us, in the competitive environment that is our business, to say that we are not interested in sentiments and feelings; but who could dignifiedly say that love is unimportant? So Shakespeare is to law & theatre what love is to sentiments.

Indeed at quite the other end of the spectrum of skepticism about the relevance of Shakespeare for the study of international dispute settlement, there are those for whom this long introduction-cum-plea is superfluous. It is unneeded to ask whether Shakespeare could be relevant. He is so *obviously* relevant, for our understanding of everything legal. Obviously, he is an emblematic protagonist of the law & literature movement. And obviously, law & literature is a particularly relevant approach to law: we are homo fabulans first and foremost; we are storytelling beings; our rationality, the way we ordinarily think, is primarily narrative and only secondarily theoretical or practical.

Shakespeare is also special to us lawyers because he concretely contributed to shaping law's rhetoric, its contents even. He still does today. He is cited by the highest courts of several countries. His work serves as authority. His work *is* a rhetorical device. More profoundly, he influenced our collective imaginaries, our understandings of justice. He thereby framed our expectations from law, which feed back into law's rhetoric. 'Poets are the unacknowledged legislators of the world', the poet Percy Bysshe Shelley used to say. Shakespeare, Ian Ward argues now, is in many ways the unacknowledged legislator of the English constitution: he is the poet of its imaginary, foundational cornerstones.[12]

As our enthusiasm for Shakespeare mounts, perhaps a word of reassurance, combined with a quick example of his relevance, is apposite.

'Let's kill all the lawyers', his most widely popular line about lawyers, was not meant to make them run for the hills (though some

[12] Ian Ward, 'Littérature et imaginaire juridique' (1999) 42 *Revue interdisciplinaire d'études juridiques* 161.

chiding was indeed intended). Context, as lawyers certainly know, is everything. So here is the context: the line was uttered in this exchange between two self-styled class-warriors, the bedraggled Jack Cade and his follower Dick the Butcher: '*Cade*: [A]ll shall eat and drink on my score, and I will apparel them all in one livery, that they may agree like brothers, and worship me their lord. *Dick*: The first thing we do, let's kill all the lawyers. *Cade*: Nay, that I mean to do.'[13] Their plan is to engineer some sort of coup, put Cade on some sort of throne. For this they need to get law and lawyers out of the way. Shakespeare plays the audience: lawyers are initially represented as vile parchment-pushers, perpetuating class injury, keeping the common folk down: a portrayal that does not exactly attract sympathy from the audience. At this stage, it seem that the class-warriors will carry the day. But then Cade, to achieve his end, decides that henceforth 'the laws of England' will 'come out of [his] mouth', a mouth that shall be 'the parliament of England'. He, Cade, will be the new law and lawyers – an incarnation that is now in stark contrast with the audience's likely intuitive grasp of what law is all.

What Shakespeare did here is representative of much of both his work and its relevance for the study of law. He put the audience in a laboratory, in this case to experiment a narrative detour through non-law. It is a laboratory of flights towards idealized hopes and harsh downfalls back unto reality. Upon emerging from the lab, the audience typically concedes that lawyers should, after all, stay put, and should stay alive a bit longer.

Such double-takes, such experimentation with radical hypotheses, such imagined trial runs of human trajectories, are indeed typical of Shakespeare. In this case, the narrative contrast makes the point about the importance of law and lawyers more persuasively than any straightforward support likely would have.

More often though, Shakespeare does not engage in any sort of advocacy. More often, his purpose is to suggest a variety of equally valid ways to look at the same situation. The situations he stages are thus represented as inherently uncertain. The audience is led to embrace that uncertainty. This focus on the diversity of legitimate

[13] Shakespeare, *Henry VI*, Part 2 Act 4, scene 2, 71–78.

views, this acceptance of inherent uncertainty: these are some of the traits of his work that make it promising, at best, or intriguing, at worst, for the study of international disputes. Indeed in the settlement of international disputes, the confines of law and of justice seem more often experimented with than they tend to be in many modern domestic legal systems.

Shakespeare's writings are indeed a universal laboratory for the thought experiments we mentioned above. A laboratory for the inherent tensions within the law we endlessly revisit and which so often permeate the resolution of international disputes. An imaginary place to put the 'what-ifs' of our core legal dilemmas through their paces. In a laconically selective survey of the questions his writings help us think about we could mention these: spirit vs letter, formalism vs equity, legality vs legitimacy, rigorous enforcement vs mercy and forgiveness (*Measure for Measure*, *The Tempest*, *The Merchant of Venice*); factual vs juridical truth, and the justice to be found in the use of circumstantial evidence (*A Winter's Tale*); vengeance vs forgiveness (*Hamlet, Richard II, Titus Andronicus*, *Julius Caesar*, but also again *The Merchant of Venice* and *Measure for Measure*); the wrongfulness and rightfulness of sovereignty (*Hamlet*); but also the games and battles of interpretation (*The Merchant of Venice*); freedom during the storms that follow tyranny (*Richard II, Measure for Measure*); legal immunities (*Titus Andronicus*); international humanitarian law and war crimes (*Henry V*); amicus curiae (*The Merchant of Venice*); and much more. As a matter of fact, even parties to international disputes can find inspiration in the trajectories produced by the Shakespearean laboratories: should one abdicate like Richard II, resist like Shylock, call public sanction upon oneself like Angelo?

This article moves in two parts. Part I discusses the legal influences of Shakespeare's work. Part II explores legal themes in Shakespeare's work.

1. Shakespeare's Law

If Shakespeare's work yields universally valid questions and lessons for our understanding of law, the making of this work was very much

influenced by altogether contingent factors. If his thought experiments with law put our legal questions into perspective, the experiments themselves should be put into perspective too, to give a context to the materials his plays played with.

William Shakespeare was born in 1564 and died 52 years later, in 1616. His father, John, was for a while a prominent businessman and a town leader in Stratford-upon-Avon, endowed with honours and red robes on official occasions, which included the exercise of legal functions. But in suitably dramatic fashion, he brutally collapsed out of business and honours, for unknown reasons, in 1577. His son was a fragile 13 years old. His plays would later be full of kings and princes fallen from grace, terrorized by doubt. (When we really write, we write with our blood.)

Of William's life we know surprisingly little. It is generally believed that he exercised lowly legal functions as a 'noverint', an attorney's clerk, in Stratford.[14] It is tempting to think that this allowed him to learn of the details of the suicide of one Katherine Hamlett in 1579 – whether she pondered her act in terms of 'to be or not to be' is of course unknown.[15] What we do know with more certitude is that graphologists recognize a jurist in his handwriting; that a highly technical law book was found in his personal library; that the moto on his family's coat of arms, which his father had applied for before William was born and was granted some 30 years later, was 'non sans droict'. Besides, many legal commentators have been eager to recognize their walk of life in the Bard's writings (perhaps the grown-up equivalent of teenagers recognizing themselves in rock stars), in the way he weighs the pros and cons of the questions he addresses. They thus think they discern the presence of a legal mind.

His exercise of legal functions also extended to personal brushes with the law. He was a plaintiff and a defendant on multiple occasions, including a number of protracted lawsuits. To be fair, these were particularly litigious times (a historical comparator that should usefully be kept in mind to contextualise current complaints about the litigiousness of society). Yet Shakespeare seems to have been even

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[14] Paul Raffield, Shakespeare's *Shakespeare's Imaginary Constitution: Late Elizabethan Politics and the Theatre of Law* (Hart 2010) 153-4.

[15] Peter Ackroyd, *Shakespeare: The Biography* (Vintage 2006) 81-82.

more vigorously eager to be in court than his average contemporaries: he was, in the words of Daniel Kornstein, 'a walking litigation factory'.[16]

His father had himself been involved in some 50 lawsuits of all sorts, including about a legal dispute concerning the contract for a loan of £40, which lasted a good 20 years and involved two generations of plaintiffs and defendants.[17] Indeed the son, as soon as he was old enough to do so, attended or participated in many of his father's cases, before becoming involved in his own many cases, many of which echoed in his plays. Just one example: the £40, 20-year saga was litigated with one Edmund, a brother-in-law of William's mother; Edmund, like the main antagonist in *King Lear*, an illegitimate son who resolves to get rid of his brother and his father. (Sometimes, conversely, it is life that seems to find inspiration in Shakespeare's plays: his daughter Susanna successfully sued a man for defamation in 1613 who had accused her of adultery – a distant echo of the slanders of infidelity in *Much Ado About Nothing* (1959), *Othello* (1603), and *The Winter's Tale* (1611).)

And so Kornstein concludes: 'Shakespeare may not have been professionally trained as a lawyer, but he surely had a long and expensive education in the law.'[18] So much, then, for arguments, based on Bourdieusian symbolic violence, that his work cannot offer reliable insights into the workings of the law because he was an inexperienced outsider. And really, Quentin Skinner points out, his forensic eloquence was uncanny.[19]

Moving on from his life to his line of work, the law looms even larger. Indeed Shakespeare's work, as theatre in England generally at the time, was mostly crafted under rather stringent legal and political constraints. These constraints altered English theatre quite profoundly and, arguably, even ushered modern theatre into life. But it was not just constraints. Theatre, from writing to performance, was really embedded in the legal and political games of the time, often at the

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[16] Daniel Kornstein, *Kill All the Lawyers? Shakespeare's Legal Appeal* (University of Nebraska Press 2005) 19.

[17] Giuseppina Restivo, 'Inheritance in the Legal and Ideological Debate of Shakespeare's King Lear' in P Raffield and G Watt (eds), *Shakespeare and the Law* (Hart 2008) 170-1.

[18] Kornstein, *Kill All the Lawyers*, 20.

[19] Quentin Skinner, *Forensic Shakespeare* (OUP 2014).

highest levels of power. It both responded to and triggered some of these legal and political constraints.

To be sure, it would be a significant understatement to say that theatre was merely a form of entertainment, a place where people could find diversions from unchangeable lives. It was quite the opposite, really: it would be no overstatement to say that theatre was an instrument of power, in ways we might find difficult to recognize today. More precisely, it entertained with the established political, moral, and religious authorities a somewhat dialectic relationship: on the one hand, it acted as a counter-power, producing and nurturing alternative ways of thinking, alternate norms and values; on the other hand, it was used by some of the powers in place as a device to trigger movements in their great political chess games.

To understand theatre's role as a counter-power at the time, picture the crowds that plays typically attracted. These were fairly rowdy, often boisterous crowds, large and prone to unrest, traversed by civil movements. Crowds not unlike those of today's football stadiums, though perhaps even more democratically representative, involving even broader bands of the people. Somewhat unlike today's theatre dwellers. Theatre, in short, was widely popular.

The first problem this created was that as theatre audiences grew, church audiences shrank. The reaction, inevitable, had been mapped out by Socrates nearly 2000 years earlier. Recall: he was found guilty of corrupting the youth and not believing in the gods of the state. In turn the theatres became accused of moral turpitude and impiety, of harbouring subversive thoughts, of fostering political riots. (They were, to be fair, also blamed for creating sanitary hazards; plague epidemics were indeed a problem.) The City Fathers, the municipal authorities of the time, led the charge.

One thing that greatly bothered the authorities, to put it in the language of contemporary legal theory, was the creation, development, nurturing of parallel norms. These were norms beyond the state, values that the authorities did not quite agree with. And all of this took place in what one may consider to be free zones. They were largely beyond the jurisdiction of the municipal authorities, places where the authorities' regular orders of theatre demolitions rarely had real effects. Although after a particularly wild riot that had started in the wake of a performance and that soon spread to the

Northern bank of the Thames, the Privy Council effectively shut down the theatres for three months. It forced Shakespeare and his fellow actors to find refuge in the countryside.

It really is not too hard to see in this parallels with current legal pluralism debates. It is as if different legal orders were playing out in theatres. Not, of course, legal orders in the Austinian sense that different rules there led to different sanctions. But in the sense of different spheres of justice, different normative references, different trials of the same situations. Notice all the trials in Shakespeare's plays based on real events. They had real symbolic effects, which move crowds more than most formal legal sanctions.

This also just might remind us of the best of international arbitration, when it creates parallel spheres of justice. Spheres of justice that are broader and more perennial that the justice that tends to be rendered within the strict boundaries of the traditional court system. Spheres of justice that remind us of the infinite variety of international disputes and that their characterization as 'legal' is really nothing more than a conventional construct. Boltanski and Thévenot come to mind here to illustrate the point: they mark out six fields of human activity, each inhabited by its own 'principles of judgment', separate and distinct from what we lawyers tend to think of, in keeping with good legal tradition, as the only real principles of judgment, those that occupy state courts.[20]

Arbitration, clearly, is not only a dispute settlement mechanism that deals with state-sanctioned legal relationships, when the parties choose to resort to a private method of dispute resolution to opt out of state courts, which we lawyers tend to think of as the necessary reference, the inevitable point of departure, when discussing all matters law.

At least from sociological and anthropological perspectives, and of course from a literary perspective, arbitration also operates on the fringes of 'the law'. It operates in areas which escape, by design or by happenstance, top-down regulation by states and instituted law. These areas, or spheres of justice, are perhaps without (official) rule of law,

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[20] Luc Boltanski and Laurent Thévenot, *On Justification: Economies of Worth* (Princeton University Press 2006).

but precisely not without a need for justice.[21] Whether certain types of international commercial disputes, international investment disputes, and some international disputes relating to the internet (all classic examples for theories on law without the state) represent examples of such spheres of justice, of such fields of human activity – this is a long and complex discussion, often bogged down in the law literature by political and professional agendas.[22] And it is not necessary to have that discussion to make our point. The point is that theatre plays, both in their actual operations and in their narrative contents, represent alternate spheres of justice, with alternate norms and values. In that they invite a comparison with global legal pluralism and some operations of arbitration.

And, a bit like states and private regulations and alternative justice, a bit like arbitration throughout much of its history and much of the world, theatres were subject to a constant guerrilla from established powers. But it was quite more violent.

In 1593, Christopher Marlowe, one of the other great Elizabethan playwright and poet, was arrested on allegations of blasphemy but soon released. Ten days later, however, he was stabbed to death in murky circumstances.

A few years later, Ben Jonson, the other major playwright of the time, was arrested on charges of 'lewd and mutinous' behaviour for having co-authored the satirical comedy *The Isle of Dogs*, and serves three months in jail. What exactly the play made fun of is unknown: the original manuscript was destroyed in 1597 and no copy is known to exist.

And then, in 1642, on the eve of the English Civil War, after Shakespeare's death, the Puritans finally carried the day: Parliament ordered the closing of theatres. Shakespeare's Globe was pulled down two years later. Dramatic art grinded to a halt. The theatres stayed closed for 20 years.

Perhaps this suggests that alternate spheres of justice tend to need charismatic figures and astute political players to keep them

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[21] François Ost, 'Arbitration and Literature', in Thomas Schultz and Federico Ortino (eds), *Oxford Handbook of International Arbitration* (OUP, forthcoming 2018).

[22] See for instance Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (OUP 2014).

going. Shakespeare certainly was a master in both. It may then not be a wild conjecture to argue that some of the afflictions that investment arbitration endures today are due to the disappearance of the so-called Grand Old Men,[23] who protected commercial arbitration until all vigorous critical movements were stopped.

As we said above, theatre was also used, sometimes, by the powers in place as an instrument of their own power. Perhaps one of the most striking examples is offered by the use of *Richard II* as an instrument to help seize power from the British government.

In 1601, the Earl of Essex, Robert Devereux, at the age of 35, engineered a coup d'état against Queen Elizabeth, hoping to take the court, the tower, and the city. One of the main chess pieces in his game was Shakespeare, one of his plays, and his company of actors. Devereux's followers convinced them to stage a special performance, at the Globe, of *Richard II*, with the scene of the deposition included. The hope was that the play would lead Londoners to riot.

The actors learned the text again in just a few days – it had been dropped off their usual inventory – and indeed staged the play the day before the rebellion. But the plot failed miserably. Devereux was arrested, tried for treason, and became the last person to lose his head at the Tower of London. Part of the incriminating evidence was, precisely, his attendance of the performance of *Richard II*.

Shakespeare, by contrast, kept his head. And his theatre. How and why he came out unharmed of these events is one the many enigmas of his life. But it seems beyond doubt that he was an astute political operator participating in power plays and intrigues at the highest level.

Be this as it may, these events more importantly show that theatre can exert very tangible real-world effects. It does so for instance when it stages trials, in particular when they re-try real events or public causes. Symbolic resolutions of symbolic disputes can have a very real impact on reality. Think of it as inter-sphere-of-justice effects: playing out scenes of justice in one sphere of justice – the

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[23] Bryant G. Garth and Yves Dezalay, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago University Press 1996). See also Thomas Schultz, 'Celebrating 20 Years of "Dealing in Virtue"' (2016) 7 *Journal of International Dispute Settlement* 531.

theatre in general or a given theatre play – can trigger changes in understandings and expectations of justice in another sphere of justice – 'the' real world.

Theatre also led to specific changes in the relationships between states and private regulations and alternative justice in a particular context: the resolution of dispute involving authors and publishers.

The wide popularity of theatre in Shakespeare's time meant that profits could be made, that professional activities could be developed, that competitive markets could be established: as Barbara Lauriat puts it, '[p]laybooks were among the many kinds of books, including almanacs, books of hymns, religious texts and poetry that brought profits to the booksellers'.[24] Manuscripts of plays simply had value, both as tangible and as intangible property. This value inevitably triggered disputes about them.

For a long while, and more precisely until 1710, long after Shakespeare's death, these disputes where confined to their own private, alternative sphere of justice. The key player at the time was the Stationers' Company, which was something like a guild of publishers. These publishers were central to the proto-copyright system of the time because they, and not the authors, had exclusive rights over the copying of their books. As Lauriat explains, the Stationers' Company had received quasi-complete control over the publishing industry from the Crown, in exchange for exercising censorship on its behalf – the prohibition of certain books had become terribly important for the Crown in the middle of the 16th century, when Henry VIII was designated head of the Church of England and needed to suppress material that had newly become heretical.[25] The power of the Company came from the fact that no book could legally be printed if it had not been licensed by it and entered in its register.

The Stationers' Company had its own private court, which had the power to resolve disputes among its members, including the infringement by one publisher of the 'copyright' of another. Its court was powerful: it could of course impose fines, but it even arranged, through connections and influence, the imprisonment of some of its

[24] Barbaria Lauriat, 'Literary and Dramatic Disputes in Shakespeare's Time' 9 Journal of International Dispute Settlement xxx (2018), xxx [page 5 in PAP].

[25] ibid, xxx [page 3 in PAP].

repeat offenders.[26] And when there was a conflict between the 'law' of the Company and the law of the Crown, the former at least sometimes seems to have trumped the latter: Lauriat reports of views held at the time about 'the injustice of a system that elevated the rights of the stationers [i.e., the publishers] above those of the authors and even, [some] claimed, of the Crown'.[27] Coming to the close of her analysis of this arrangement, Lauriat concludes that there were 'overlapping, quasi-legal systems of ownership of dramatic works in Shakespeare's time'.[28]

It all ended though in 1710, with the enactment of the Statute of Anne: Britain's and probably the world's first copyright act.[29] It transferred much power from the publishers to the authors and thus concluded the near-exclusive control over the industry that the Stationers' Company had enjoyed until then. It may be surprising to us, academics in the 21st century obsessed with authorship, but Shakespeare's early plays were published without attribution. His name did not appear on the title page until he was already close to the height of his career, writing *The Merchant of Venice* and about to become the owner with his company of the Globe Theatre.[30] At any rate, the effect of the Statute of Anne, as Lauriat puts it, was that 'the period of self-regulation with its internal system of resolving disputes between those involved in the book trade had ended. Copyright was now a matter to be thrashed out in the courts' – meaning in state courts, outside of the previous alternative sphere of justice.[31]

The post-1710 system ushered in a new era for authors, a much clearer system of copyright protection roughly similar to what we have today, state controlled, with less obvious alternative spheres of justice. On whether this is a good thing, Lauriat has this to say: noting the correlation between the sharp decline of English theatre and the maturing of the copyright system, she concludes that '[w]hile no

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[26] ibid, xxx-xxx. (4-5 in PAP)
[27] ibid, xxx-xxx. (6 in PAP)
[28] ibid, xxx-xxx. (13 in PAP)
[29] Lionel Bently, Uma Suthersanen, and Paul Torremans (eds), *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar 2010).
[30] Barbaria Lauriat, 'Literary and Dramatic Disputes in Shakespeare's Time', xxx-xxx. (5 in PAP).
[31] ibid, xxx-xxx. (7 in PAP)

doubt fairer to authors en masse, the one-size-fits-all approach of modern copyright is not necessarily the sole or best way to produce a concentration of works of enduring genius.'[32] Might there be a connection between the plurality of spheres of justice and creativity, be it only because of the need to switch between multiple universes of references and ways of thinking? It does not seem implausible.

2. Shakespearean Legal Themes

A vast array of legal themes traverse Shakespeare's work. It is almost as if whenever we lawyers come up with a new theme, there is something, somewhere, in Shakespeare that helps us think about it. If his purpose was to use the theatrical scene as a mirror for his contemporary society to represent itself and understand itself, he has succeeded far beyond his aim: certainly we as actors of the life of the law, today, still have many revealing reflections to see in his work.

Some of these reflections are analytically illuminating. Others are truly cathartic, and humbling. Many suggest how much we still live in the same collective legal imagination as we did in Shakespeare's time. This is remarkable because it is that collective imagination which is the true ultimate foundation of law, not some legal doctrine or theory. We are still very much part of the same legal 'narrative community', as Michael Sandel would put it.[33] We tell ourselves many of the same social-historical stories, which we take for truths instead of the creations of our own society that they really are.[34] Truths on which we build our identities and, on these identities, the themes of our legal understandings.

We should begin with what is a rather self-evident theme in a law & theatre approach: the role of masks. (The fact that 'masques' were a very popular form of partying in the English Inns of Court in the 16th and 17th century, used to express the values of law and the joys of the legal profession, is not the only reason that makes it a self-

[32] ibid, xxx-xxx. (13 in PAP)

[33] Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Harvard University Press 1996).

[34] Cornelius Castoriadis, *The Imaginary Institution of Society* ((MIT Press 1987).

evident theme.[35]) Now granted, judges and advocates wear wigs and gowns in some jurisdictions, not quite masks. At least not in the physical, material sense. But metaphorically, law is no doubt very much a matter of masks – at least in the narrative community we commonly inhabit.

At the most basic level, one of the very tasks of law is to serve as a language into which we translate our situations, our disputes. Law grants linguistic hospitality to our complex, contradictory, uncertain world.[36] But of course law does not quite allow us to *fully* apprehend any reality. No translation does. No language could. In that sense, law can be seen as a mask we put on reality, emphasizing some of its traits, hiding others, retaining a version of the phenomenon to be accounted for which could easily be swapped for another. Remember Hegel: 'The first act by which Adam established his lordship over the animals is this, that he gave them a name, ie, he nullified them as beings on their own account.'[37] Phenomenologists would probably concur: we have no direct access to reality; reality always comes masked; law is one such mask. Reality wears that particular mask for certain special occasions.

Let us take this general point about masks one step further, into the realm of international dispute settlement. Now notice the array of international disputes submitted to international courts and tribunals with the only real purpose of removing them from the realm of political responsibility of the actors involved. Interstate disputes would be the most typical occurrence.[38] Such disputes are out of political hands when they are in the hands of an international tribunal. The parties – taken not as legal entities but as actual individuals with lives and personal interests – distance themselves from governance responsibilities, or other problem-solving responsibilities, by setting in motion the theatricalities of the trial. These theatricalities then follow their own dynamics. Think of the litigation of such disputes as a stage,

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[35] Martin Butler, 'The Legal Masque: Humanity and Liberty at the Inns of Court' in Lorna Hutson (ed.), *The Oxford Handbook of English Law and Literature, 1500-1700* (OUP 2017).

[36] François Ost, *Traduire: Défense et illustration du multilinguisme* (Fayard 2009).

[37] Georg Wilhelm Friedrich Hegel, *System of Ethical Life and First Philosophy of Spirit* (State University of New York Press 1979) 221

[38] Vitalius Tumonis, 'Adjudication Fallacies: The Role of International Courts in Interstate Dispute Settlement' 31 *Wisconsin International Law Journal* 35.

with actors (the parties) wearing masks of concern for their constituencies, when they really mean a different, and not necessarily worse, realpolitik.

Within a trial, masks of course also play a role. Their purpose is no longer to create the entire representation, the play. It is not to make the trial exist, as a proxy or placeholder for something else. The purpose of the masks is here rather to assign roles within the trial. In theatre, assigning clear roles to the characters of a play, clarifying the assignation of these roles, is one of the key functions of masks. This was so in particular in classical Greek theatre, where the use of masks was central to the very idea of theatre as a form of art, transforming the actors into their characters.[39] After all, the Greek word for masks is 'persona'. (So much for our personalities.) It is also a key role of law to assign clear roles to the parties within a trial, for the purposes of the trial and beyond: when one party is made to wear the mask of the perpetrator, the other that of the victim, this matters both for the trial itself and, through a cathartic process, it serves to reaffirm rules, values and their corresponding roles, for society at large.

Even a court itself sometimes wears a mask to perform a particular role for a particular audience. A court may indeed wish to present what it does in a particular way, perhaps even disguise it. It may transpose its voice, for instance in order to please a particular audience. The International Court of Justice has been shown to go to quite great lengths in trying to please states and their representatives.[40] The perceived legitimacy and use of the ICJ was historically something that the Court had to fight for and progressively earn.[41] Now it is something it has to defend in order to keep. To defend it, the Court has to remain appealing to states, because everything depends on their goodwill, on the readiness of states to use the Court. To be appealing to states, the Court uses a certain language, presents its decisions in a certain way, takes on a certain guise. It wears a mask it hopes states will find alluring.

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[39] David Wiles, *Mask and Performance in Greek Tragedy* (CUP 2007).

[40] Andrea Bianchi, 'Gazing at the Crystal Ball (again): State Immunity and Jus Cogens beyond Germany v Italy', 4 *Journal of International Dispute Settlement* 457 (2013), 474.

[41] Georges Abi-Saab, 'The International Court as a World Court', in Vaughan Lowe & Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996) 3, 6-7.

Even this laconically selective survey already reveals several roles for masks in law. Masks are worn by the parties to make trials exist; the law assigns masks to the actors of the trial; and courts themselves wear masks. Trials, in truth, are very much a masked affair.

It is then unsurprising that Shakespeare's most famous trial scene, in *The Merchant of Venice*, takes place in Venice, the city of masks par excellence. In the play's representation of Venice, it is as if carnival had become second nature to everyone involved. Travestying is routine, concealment the order of the day. Masks, in their ambivalence, incarnate truth in Venice. They enable everyone to take on shifting incognitos. Everybody is an actor. The masks grant a release from conventions of social behavior. They give free rein to audacity. They allow all forms of excess under the reassuring protection that it is all a game. A game of shadows. A game of masks.

By exaggerating the traits of the masks used in the play – by performing a masquerade of masks, if you will – Shakespeare invites the audience to look beyond the masks. The entire play acts as a lie detector of sorts, trying to bring out some veracity from behind the appearances, some justice from behind the legal. But it also exhibits certain vile social-historical stories behind appearances of justice: antisemitism against Shylock the outcast Jewish moneylender. It brings to light the untruth of simple views on the relationship between justice and black letter legalism: mercy is invoked to prevent an injustice, only to create another, as is strict insistence on the letter of the contract. And it shows the duplicity that law sometimes resorts to in order to achieve justice: saving Antonio's life by travestying Portia as Balthazar, the accused's friend's lover as the neutral legal expert, which is the play's ultimate mask.

The Merchant of Venice also displays the perils of the extremes in the use of masks. Shylock, at one extreme, is the only character that appears to wear no mask – or at least just one mask, the one thrust on him by the Christians, the hard, cold, mechanistic Jewish 'other'. His utterances require no interpretation. He says what he thinks and thinks what he says. His language is straightforward, direct, precise, repetitive. But of course his intransigency, his masklessness, will eventually backfire and be his demise. Yet at precisely that moment we also understand that his single-mindedness is itself really a mask

hiding the complexities of his sentiments. When he shows emotions, even passion ('I *crave* the law', he says), his mask flies off his face and we feel compassion and solicitude for this fallible, vulnerable man. As if the absence of a mask is a mask itself, awkwardly trying to hide the multiple, frail, what-ifs of our identities – starting with this endless query: 'what if *I* were the "other"?'.

For the Venetians, at the other extreme, only appearances count. People promise the world and then compromise themselves. They commit themselves and then commit perjury. They get involved and then evolve. One's word, as all the rest, is light and easy to give, inconstant and characterless. Nothing must stand in the way of the mondaine ballet of conversation. The irony in the story is that it is Portia, one of the Venetians' own, who will eventually lecture them about the importance of promises and truthfulness – but only after she has herself used masks to compromise promises and truthfulness. In Act V, she admonishes Bassanio, who has just 'sw[orn] to thee, even by thine own fair eyes': 'Mark you but that! / In both my eyes he doubly sees himself; / In each eye, one: swear by your double self, / And there's an oath of credit.' Bassanio, of course, does not learn a thing, and immediately swears again: 'Nay, but hear me: / Pardon this fault, and by my soul I swear / I never more will break an oath with thee.' Then again the extent of the promise, this time, is clarified by his friend Antonio, who explains that Bassanio 'Will never more break faith *advisedly*.'

Portia herself is not innocent. What she blames Bassanio for is that he cannot produce their betrothal ring, which he had promised never to relinquish. But of course it is Portia herself, masked as Balthazar, who made Bassanio part with the ring, when she requested it as a token of appreciation for saving Antonio's life. Moreover, when she lectures Bassanio, Portia uses one of Shylock's own key arguments: the connection between the word given and the flesh itself. She refers to the ring with the following language: 'A thing stuck on with oaths upon your finger / And so riveted with faith unto your flesh.' At this point, is Portia sincere or is she rather taking the whole masquerade to an extreme?

Ian Ward takes us to another play to elaborate on the role of masks as a Shakespearean legal theme: *Henry VIII*. As Ward immediately points out, what characterises the play is that 'In all the

other histories, there are lots of soldiers and lots of battles. There are none in *Henry VIII*. In place of war there is law.'[42] Would masks have something to do with it? The subtitle of the play, *All is True*, suggests as much.

The play revolves around a central 'trial': the Legatine Court established to deal with Henry's divorce from Katherine of Aragon. The point for Henry was to get Anne Boleyn. She was available and attractive. He wanted to have her. At any cost, be the cost the Reformation and the establishment of the Anglican Church and profound alterations in the English constitution. There are also smaller, satellite trials in *Henry VIII*. In fact, there are particularly many trials in the play. All seem to bring up 'questions of veracity and judgment.'[43] In the end, the play is really all about 'judgement and its disappointments.'[44] And disappointments point to expectations.

Of disappointments with trials, judgments, and lawyers, there are a good deal in the play. First there are the trials of the Duke of Buckingham and of Cardinal Wolsey. The former is arrested on frivolous charges of treason, arranged by the latter. But soon Wolsey gets it in turn: initially Henry's favourite, he eventually falls in disgrace and is accused of trumped up charges of illegal involvement from foreign courts with England's affairs, stripped of his seal and his lands and banished from Council. As Ward puts it, these two trials are simply 'travesties of justice, if not legal form.'[45]

Then there is of course the Legatine Court itself.[46] A court engineered by the plotting Cardinal. A court of which Wolsey is 'enamoured'.[47] A court which is at the centre of the play because the entire play is really about Wolsey, not Henry. It is about the Cardinal's 'vaulting ambition', and about the instrument of his ambition – the court.[48] A court which does not resolve anything,

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[42] Ian Ward, 'The 'Great Matter' of King Henry VIII' 9 *Journal of International Dispute Settlement* xxx (2018), xxx [abstract].

[43] Ibid, xxx.

[44] Ibid, xxx.

[45] Ibid, xxx.

[46] On the real Legatine Court, see for instance Henry Ansgar Kelly, *The Matrimonial Trials of Henry VIII* (Wipf & Stock 2004 [first published 1976]) 75ff.

[47] Ward, 'The 'Great Matter' of King Henry VIII', xxx.

[48] Ibid., xxx.

except eventually leading England to set up its own Church and to break with Rome, all because of an emotionally unstable king in search of manhood (Brexiteers have invented nothing). A court that was not *meant* to resolve anything; but as Ward reminds us, 'Shakespearean lawyers rarely resolve anything much' anyway.[49] A court that was not meant to be impartial either, but only to mask Wolsey's political machinations and self-advancement.[50] *All is True*, really?

King Henry VIII is not much different himself. His role in his own trial is ambivalent.[51] Formally he is of course no judge, but 'sat beneath his "cloth of state" it is only too apparent that he is there to judge. And he is quick to intervene, to "spare that time" and move things on.'[52] His ambivalence – or is it a dialectic relation? – generally extends to truth and masks.[53] On the one hand he 'rails against the entire proceeding, the 'dilatory sloth and tricks of Rome"'.[54] On the other hand 'nothing Henry says is quite what it seems', he repeatedly self-fashions himself, he 'perform[s] in masques', 'hide[s] behind curtains "reading pensively" or simply spyi[es] on others'.[55] All in all Henry 'cuts through the pretence, and yet is so obviously defined by it.'[56] A masked man in pretended search for simplicity in a trial. *All is True*, really?

Yes, really, suggests the Prologue: but a 'chosen truth' (Prol.18). A truth unconcerned with historiography.[57] A truth about complex relationships.

First the relationships between masks and justice: the trial itself would not have taken place but for Wolsey's pretences, yet it is

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[49] Ibid., xxx.

[50] Ibid., xxx. [where he cites masque and political ambitions]

[51] On the centrality of Henry's role in the trial, see also Kim H. Noling, 'Grubbing Up the Stock: Dramatizing Queens in Henry VIII' 39 *Shakespeare Quarterly* 291 (1988), 294: 'Henry, though nominally a witness at the beck and call of the court, now sits in state alone at the apex of the court's hierarchy, *above* the judges Wolsey and Campeius.'

[52] Ward, 'The 'Great Matter' of King Henry VIII', xxx.

[53] See for instance Northrop Frye, 'Structural Affinities Between the Masque and Shakespearean Romance', in Carol McGinnis Kay and Henry E. Jacobs (eds), *Shakespeare's Romances Reconsidered* (University of Nebraska Press 1978) 29.

[54] Ward, 'The 'Great Matter' of King Henry VIII', xxx.

[55] Ibid., xxx. [all pages cited]

[56] Ibid., xxx.

[57] Ibid., xxx. [where he says The history is slippery]

Wolsey's 'witchcraft' in language which eventually precipitates his own fall.[58] Wolsey, whose 'oral signature in the play', as Lynne Magnusson puts it, is a 'curious hybrid of deference and self-aggrandizement'.[59]

Then the relationships between the theatricality of justice and the irresolution of matters not really meant to be resolved: Shakespearean trials rarely inspire confidence and his judges often fail to reach judgment, but theatricality may well be the end and not the means, both in the plays and in real trials.

And finally the relationships between reaching judgment and our expectations of trials: 'the theatricality militates against the pretences of […] jurisprudential "truth"',[60] Ward tells us.

Law itself, and trials in particular, are a mask of truth – a '*chosen* truth', in the words of Shakespeare's prologue. A 'mask of truth': odd choice of words, perhaps. But it alerts us lawyers to the idea that a trial, the resolution of a legal question, does not always correspond to, may be neither cause nor consequence of the resolution of, a real question. Certain things are simply not meant to be resolved, certain questions not answered. Yet appearances count: they constitute a truth of their own. When dispute resolution procedures achieve irresolution, as in the play, it may be a resolution of appearances. The achievement, the resolution simply takes place at another level.

And if answers to legal questions write a story, or indeed history, the story is just a *'chosen'* story, a *'chosen'* history, which could have been written very differently. The whole idea of *Henry VIII* suggests as much: it is to 'reconvene[…] the Legatine Court so that it might consider the case for an appeal; and the audience will serve as his jury',[61] undoubtedly with the implicit point that each audience will be different, would write the story, and history, differently.

So legal questions are masked questions. But they certainly come with a pretence of truth. A trial then becomes a theatrical 'doing as if', which makes it possible to overcome many difficulties which

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[58] ibid., xxx [where he speaks of witchcraft]

[59] A. Lynne Magnusson, 'The Rhetoric of Politeness and Henry VIII' 43 *Shakespeare Quarterly* 391 (1992), 408.

[60] Ward, 'The 'Great Matter' of King Henry VIII', xxx.

[61] ibid, xxx.

would stand in the way of resolution in the perspective of other chosen truths. Remember Hegel again: 'The first act by which Adam established his lordship over the animals is this, that he gave them a name, ie, he nullified them as beings on their own account.'[62] A name is a mask. And naming is opting for a given chosen truth. A theatrical 'doing as if' is the same. It may resolve a chosen question within a chosen truth. Sometimes this may be quite enough. Sometimes it does not really resolve anything.

From masks we easily move to authority. At the simplest level, both relate to roles, and connect to it from different perspectives. One is more a cause than a consequence of a role. The other more a consequence than a cause. As Fuad Zarbiyev puts it, 'authority can be described as a mode of regulating behaviour. … An authoritative utterance determines behaviour not because of a threat of sanction (or a promise of a reward), or through persuasion, but because *it emanates from a particular person*.'[63] In the language of the analysis conducted here, we would say that an utterance is authoritative because it emanates from 'a particular person wearing a particular mask', in other words a particular character. Zarbiyev would call such masks marks of deference-entitling properties.[64] A mask causes a role which causes authority. As we will see in a moment, it is a socially sanctioned mask.

If meanwhile we take the analysis one step further, it is not difficult to see that masks and authority relate to a form of desire: desire to be perceived in a certain way, desire to be respected, and obeyed. Both are also associated with rituals: the rituals of going through the motions of the role ascribed by the mask and thus reinforcing both the role and the mask, the rituals of procedurally complying with the marks of authority. And both have a bearing on language: masks alter voices both physically and metaphorically, authority creates voice. To be sure, both masks and authority are central to law.

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[62] Georg W.F. Hegel, *System of Ethical Life and First Philosophy of Spirit* (State University of New York Press 1979) 221

[63] Fuad Zarbiyev, 'Saying Credibly What The Law Is: On Marks of Authority in International Law', forthcoming.

[64] ibid.

Maria Aristodemou substantially thickens that simple analysis, through a novel examination of *Hamlet* – of all plays.[65] *Hamlet* is said to be the one play about which the greatest number of critical analyses have been written.[66] The one Shakespeare play everyone can quote six words from. Nevertheless Aristodemou offers an inventing discussion of it, based on a psychoanalytical, principally Lacanian perspective. One that, precisely, connects it to law, desire, authority, and language.

Recall the plot: Hamlet, the prince of Denmark, hears from his father's ghost that the previous king, indeed his father, was killed by Uncle Claudius who wanted and got both his throne and his wife – Hamlet's mother, then. Upon learning this, Hamlet rushes into inaction. He spends most of the play moaning, trying to decide what to do about the whole affair, drives the woman who loves him to suicide, alternately berates and comes on to the queen his mother, and in the end everybody dies. *Hamlet* is about many things, but almost everyone agrees that it revolves around Hamlet's Oedipal relationship with his mother.[67] And that is indeed Aristodemou's point of entry into the play.

Hamlet, Aristodemou argues, is very much about law, incarnated by his dead father (pun intended). She puts it thus: 'Rather than mourning for King Hamlet [the father], we can see Hamlet as resentful and anxious of the fact that his father's death has left him 'too close' to the maternal object. Without the intervening agent of the father to regulate his desire in accordance with the law, Hamlet finds himself too close to Gertrude [his mother] who, as Claudius puts it, "lives by his looks"'.[68] Hamlet then, as a good Oedipal subject, wants his mother but also wants to be prevented from wanting, wants that his Oedipal wanting be repressed. This is where the law – that is, the father – should have come in. But of course it/he is dead. Its/his absence leaves Hamlet paralysed, in action.

Law, then, is a mechanism of repression, a desirable mechanism of repression of desires. For if we repress the mechanism of

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[65] Maria Aristodemou, 'To Be or Not to Be a (Dead) Father' 9 *Journal of International Dispute Settlement* xxx (2018), xxx.

[66] Pierre Bayard, *Enquête sur Hamlet. Le dialogue de sourds* (Minuit 2002).

[67] One who thinks that Hamlet's interest in his mother is secondary is Richard Posner, *Law and Literature* (3rd edn, Harvard University Press 2009).

[68] Aristodemou, 'To Be or Not to Be a (Dead) Father', xxx.

repression, Aristodemou continues, what happens is that we are left with the belief that '[e]ven our repression is not good enough as there is no higher law to authorize the 'quality' of our repression. Hamlet', the author goes on, 'is perhaps the first literary representation of the modern depressive subject, depressed because even his repression of his desire is not good enough.'[69]

In other words, the absence of law, the absence of repression, leads to depression, which is the absence of desire. A dilution of law, then, far from being liberating, would rather cause inaction (a lack of desire), or at best random provocation: 'There is no more effective way of ensuring the law's existence than to keep provoking it into proving its very being.'[70] From that perspective, we can see this about the role of the law: law is there to regulate desire and, by regulating it, it makes room for it. Law arouses desire by repressing it.

For international lawyers, this may well translate into a call to oppose the dilution of international law, for instance in the form of a sweeping recognition of informal international law as international law.[71] If 'everything' is law, not only do we risk losing all sense of what it is.[72] We also risk losing its desire-regulating and thus desire-arousing function, which is material at the granular, atomic, interpersonal level of all sorts of international affairs (pun again intended). If this is true, and if the actors of international commerce for instance are individuals who normally have desires, then the absence of this function of law would lead, at the end of the chain of consequences, to a depressed state of international commerce. Put simply, if a pseudo Lacanian-father authority is attached to a too wide array of norms, that authority is effectively diluted and loses its repressive function. And the loss of its repressive function kills action

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[69] Ibid., xxx.

[70] Ibid., xxx.

[71] Joost Pauwelyn, Ramses Wessel, and Jan Wouters (eds), *Informal International Lawmaking* (OUP 2012).

[72] Simon Roberts, 'After Government? On Representing Law Without the State' 68 *Modern Law Review* 1 (2005), 24, arguing that law 'may well be found everywhere; but in representing it like that, we risk losing all sense of what it is.'

instead of triggering it. Or brutally simplified: too many rules, all of which are quite soft, hampers initiative.[73]

Another point of interest in the play, Aristodemou further argues, is what it tells us about rituals and authority and how truths are best uttered. First of all, for Shakespeare rituals are a defining element of humanity, they 'are essential to mark man from animal'.[74] Hamlet asks indeed this: 'What is a man,/ If his chief good and market of his time/Be but to sleep and feed? A beast, no more.'[75] Aristodemou explains it thus: 'It is the extra expenditure, the surplus, and even superfluous, forms and rituals that mark the distinction between humanity and animality; neglecting them, Shakespeare suggests, is to regress to a beastly existence.'[76] We are human because many of the things we do are not material in attaining the immediate object of our actions. We are human because we inhabit a symbolic world.

The function of rituals in the context of authority considered through *Hamlet* is to fill the gap between the king's two bodies, and thus to reinforce the authority of the physical king through the authority of his symbolic counterpart. Aristodemou puts it thus: 'The rituals and insignia surrounding monarchy help fill the distance between the two bodies: monarchy as a political system uses the King as a figurehead that […] is structurally necessary to close the system.'[77]

Rituals make us grant authority because we see others, real or symbolic others, grant authority. We believe – in authority, in legitimate exercise of power, in the obligation to obey – because someone else believes: 'Rituals foster a belief in the system, a belief which, like all beliefs, functions vicariously and from a distance: we believe because we believe someone else believes, and functions as

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[73] Same vein, different context: creativity in children has been linked to the number of domestic rules: Adam Grant, 'How to Raise a Creative Child. Step One: Back Off', New York Times, 30 Jan 2016: 'The parents of ordinary children had an average of six rules, like specific schedules for homework and bedtime. Parents of highly creative children had an average of fewer than one rule.' A small number of steadfast rules is worth infinitely more than a greater array of less reliable directions.

[74] Aristodemou, 'To Be or Not to Be a (Dead) Father', xxx.

[75] *Hamlet*, 4.4.32-34.

[76] Aristodemou, 'To Be or Not to Be a (Dead) Father', xxx.

[77] Ibid., xxx.

the guarantor of our faith.'[78] Or as Zarbiyev puts it, 'Authority does not rest on individual choices, but on "a belief system" that socially sanctions it.'[79] (Hence the socially sanctioned mask from above.) 'If the collective belief system supporting authority within a community disappears', Zarbiyev continues, 'authority itself will disappear'.[80] We believe because of a belief system. We believe because others believe. Anyone's authority rests on our collective and thus individual belief in it, constantly refuelled by rituals around it.

The idea applies in full in international dispute settlement. The international judiciary, and the sundry judges and arbitrators that constitute it, have two bodies too. One is politic and one is natural. There is the function and there are the women and men who inhabit it. Here too the various court rituals and the business rituals in arbitration serve to ground the authority of the natural, physical women and men in the authority of 'the' judge and 'the' arbitrator. We obey judges and arbitrators principally because of rituals. They symbolically create the function of the judge and the arbitrator, and make us believe that others obey them because they too follow the rituals. We obey them only secondarily because of any authority inherent in the personal traits of the judges and arbitrators as natural people or because of any real threat of a sanction. Even a pathetic judge or arbitrator is granted authority. The rituals close or reduce the gap between the king's, the judge's, and the arbitrator's two bodies.

Now Hamlet precisely forces this gap open. *Hamlet*, in that sense, really is an attack on monarchy. Hamlet's soliloquies, Aristodemou suggests, reveal the distance between the two bodies of the king, between the 'symbolic role of King and the pathetic person it's attached to'.[81] The gap is forced open by Hamlet's reminder, 'in the graveyard scene, that the King, after all, is a mortal man like the rest of us'.[82] This reminder draws attention 'to the gap between the (all too human, if not pathetic) person occupying the office of King and the symbolic role'.[83]

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[78] Ibid., xxx.
[79] Zarbiyev, 'Saying Credibly What the Law Is'.
[80] Ibid.
[81] Aristodemou, 'To Be or Not to Be a (Dead) Father', xxx.
[82] Ibid., xxx.
[83] Ibid., xxx.

Clearly, as in any other area of human activity, not every member of the international judiciary is the opposite of pathetic. This is not a particularism of our time. It was so in the past and will be so in all credible futures. Not everyone is not a sham. Not everybody should be granted the authority that comes with the role through the catalyst of the rituals. But how to expose the sham? Surely not by engaging in a soliloquy with a skull in a courtroom?

Well, this would not be so far off. Not quite with a real skull of course. Shakespeare, Aristodemou explains, can safely do this, he can safely re-examine monarchy at a stone's throw from the monarch, he can safely touch on the touchiest subjects, he can proceed, as Lacan would say, on the path 'toward conquest of the truth', because he presents it as being on 'the path of deception'.[84] By portraying himself as mad, by disguising himself as a madman, by concealing what he really means under what Freud suggests is an intended 'cloak of wit and unintelligibility',[85] he can make real progress. Appear crazy or farcical and your utterances of inconvenient truths will be condoned. Exaggerate and you will be tolerated. Notice that this was the very role of court jesters.

Certain judges and arbitrators have long understood this. Some of the greatest jurisprudential progresses have been achieved through outlandish or unintelligibly presented or even witty arguments, often under the guise of unimportance, in obiter dicta. The truth here simply seems to be that, to say the truth, for instance to expose shams, gaps between authority granted and authority deserved, one might need to say it in a seemingly untrue manner.

The theme of the authority of the international judiciary and arbitrators should briefly take us back to *Henry VIII* and Cardinal Wolsey. We might recall that Ward pointed out how Wolsey was devoured by ambition, and how his ambitions did no good to the trials he was involved in.[86]

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[84] Jacques Lacan, *On the Names of the Father* (Polity Press 2013) 90, cited by Aristodemou, 'To Be or Not to Be a (Dead) Father', xxx.

[85] *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, The Interpretation of Dreams, Volume V (1900-1901) (Vintage 2001) 444, cited by Aristodemou, 'To Be or Not to Be a (Dead) Father', xxx.

[86] Ian Ward, 'The 'Great Matter' of King Henry VIII', xxx. [where 'vaulting ambition']

Now, Joost Pauwelyn conducted an empirical study comparing World Trade Organisation panellists (WTO 'judges') and investment arbitrators.[87] The broader theme of his study was the stark difference between the respective levels of societal criticism these systems of dispute settlement are facing – remarkably light with regard to WTO dispute settlement,[88] conspicuously heavy in investment arbitration[89]. The rules of the two systems are of course largely distinct, but he surmised that who decides the disputes is also part of the problem.

What is curious, he seemed to think, is that it is generally understood that to get the rule of law, understood as a societally accepted system of governance, you need the rule of lawyers, understood as the dominance of high-flying lawyers.[90] Yet precisely, his study showed, WTO panellists are '"Faceless Bureaucrats"', 'diplomats or ex-diplomats, often without a law degree and mostly with relatively little experience', while investment arbitrators are '"Star Arbitrators"', 'high-powered, elite jurists with a much deeper level of expertise and experience as compared to the average WTO panelist'. To the point that they are '"from different planets"'.[91]

How come? How is it possible, he asked, that 'a regime with adjudicators that ostensibly have less expertise and experience (WTO dispute settlement) can outshine a regime (ISDS) with, on its face, higher-quality decision-makers'?[92] For Pauwelyn, the puzzle is all about a lack of '"voice" and political participation' in investment

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[87] Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus' 109 *American Journal of International Law* 761 (2015).

[88] Gregory Shaffer, Manfred Elsig and Sergio Puig, 'The Extensive (but Fragile) Authority of the WTO Appellate Body' 79 *Law & Contemporary Problems* 237 (2016).

[89] Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice. How law firms, arbitrators and financiers are fuelling an investment arbitration boom* (Corporate Europe Observatory and the Transnational Institute 2012). For an examination of the effects of investment arbitration, though not of the causes of these effects, see for instance Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' 25 *European Journal of International Law* 1147 (2014) and Cédric Dupont and Thomas Schultz, 'Towards a New Heuristic Model: Investment Arbitration as a Political System' 7 *Journal of International Dispute Settlement* 3 (2016).

[90] Joseph Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' 35 *Journal of World Trade* 191 (2001).

[91] Pauwelyn, 'The Rule of Law without the Rule of Lawyers?', 763, 768, 780, 783.

[92] Ibid., 800.

arbitration: the pool of investment arbitrators is simply not representative and inclusive enough, and this weighs more heavily than the difference in levels of expertise.[93]

Fair enough. But from a Shakespearean perspective, one cannot but think of another hypothesis: a possible link between the respective ambitions of these two groups of dispute resolvers and the respective levels of societal criticism. Can some investment arbitrators be likened to Cardinal Wolsey? Does their 'vaulting ambition' do any good to the system?

Is reliance on 17th century literature enough of a cloak of wit and unintelligibility to even querstion this? Does it take a law & literature approach with its repertoire of metaphors, indirectness, cloaks of wit and apparent unintelligibility, to ask such sensitive questions and investigate such unpopular hypotheses? Could studies as brilliant as Pauwelyn's become even more illuminating with the addition of the fuzzy logics of a law & literature method?

Let us leave aside the fervour and the ardour that such questions would inevitably trigger, and turn more squarely to the role of passion in the settlement of international disputes, and in the creation of such disputes.

Gary Watt takes up the theme through the lens of *King John*.[94] He applies it to the example of Brexit – sadly the already classic example of excitement against rationality. 'In King John', Watt says, 'we sense that Shakespeare is speaking very directly to the same passions that have arisen in the Brexit dispute'.[95]

Yes, undoubtedly, Brexit is an entirely irrational thing to do. But it obeys death-seeking passions, just like many other forms of self-destructive behavior, aggregated here at the national level. As we know, such forms of behavior are often an attempt to use drama to solicit attention and help. These in turn makes drama aesthetically pleasing because attention and help, ultimately, evolutionarily, are good for survival. In a sense then, we are genetically coded for drama. In a sense then, Brexit can be viewed as something like a purposefully

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[93] Ibid., 765.

[94] Gary Watt, 'Sovereigns, Sterling and "Some bastards too!": Brexit seen from Shakespeare's King John' 9 *Journal of International Dispute Settlement* xxx (2018), xxx.

[95] Ibid., xxx.

failed suicide attempt: a call for help from individuals with certain characteristics.

For Watt the story is understandably more complex. There are three reasons that played out in the Brexit referendum, he argues: arguments about 'who should have power over the people', argument about 'personal and national economic well-being', and arguments grounded in 'illegitimate prejudice and xenophobia'.[96] And the whole thing of course only materialized because of a misjudgment of the respective strengths of these factors in the decision-making of voters: more precisely, he points out, '[u]nderlying the miscalculation of the public mood was a dangerous failure to appreciate how great a sense of human worth is generated by the power to exercise a dramatic act of self-determination.'[97]

The passions triggered by 'home-nation sovereignty' were underestimated.[98] It is irrelevant to these passions that nations are 'imagined communities'.[99] That they are the socially constructed equation between a dominant community and a territory.[100] That they are creatures initially carved into life in a fight against feudal lords, the Church, and local customs. It makes no difference, or rather not enough difference yet, that transnational communities are on the rise, distant echoes of pre-nation-state collective life.[101] As Watt puts it, just like the citizens of Angiers in *King John* when they are asked 'Whose title they admit, Arthur's or John's',[102] in other words when a rather inconsequential town is asked who should be king, certain people 'found pleasure in the fleeting power of their own political supremacy and seized the moment eagerly.'[103]

Shakespeare and law, in the end, may be seen as having a dialectical relationship with passion. On the one hand, the masquerade

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[96] Ibid., xxx.

[97] ibid., xxx.

[98] Ibid., xxx.

[99] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1983).

[100] Ernest Gellner, *Nations and Nationalism* (Cornell University Press 1983).

[101] See for instance, with further references, Thomas Schultz, 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists' 10 *Yale Journal of Law and Technology* 151 (2007).

[102] *King John*, 2.1.198-200.

[103] Watt, 'Sovereigns, Sterling and "Some bastards too!", xxx.

of law, discussed above, helps translate the story at hand into a less passionate version so that it becomes easier to deal with rationally. On the other hand, law, and perhaps in particular the settlement of international disputes, needs to take such logics into account. Watt remarks that King John puts it thus in the play, 'This might have been prevented and made whole / With very easy arguments of love'.[104] The role of the law in the resolution of disputes, then, may well often be to turn death-seeking passions and logics of death into logics of life.[105]

This idea of law's pursuit of logics of life comes nicely into play in *Measure for Measure*. An imaginary Vienna grapples with a somewhat unhealthy degree of licentiousness. The good Duke ruling over the city ostensibly departs, leaving the keys to the city to his deputy, the zealous and puritanical Angelo. The shift in power is the occasion of a reflection on the right measure in law's enforcement and in its reach.

As soon as he is at the helm, Angelo revives old legislation punishing extramarital sex by death. The city's many brothels are all closed in one swift move. Unmarried lovers are driven into deathly territories. And then the questions come: Can repression contain sex drive? Should it, when it is all consensual? And in the event of an offense, should prohibitions be systematically enforced?

'Yes', Angelo responds doggedly to each of these questions. Until, as a matter of course, he too succumbs to the guilty inclinations he claims to eradicate. He yields to his lust for Isabella, a beautiful woman who intends to join a particularly numbing nunnery. He offers her mercy for her brother Claudio, who was sentenced to death for having sex with his girlfriend. Claudio's life is his price for her body. No deal, she says.

By temperament Angelo is a heedless slave to the letter of the law. But by return of the repressed he is also an anguished slave to his own humanity. For this is the human condition: either we embrace our humanity and make it our force, or we push it off only to fall in its

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[104] *King John*, 1.1.35-6, quoted by Watt, 'Sovereigns, Sterling and "Some bastards too!"', xxx.

[105] François Ost, 'Arbitration and Literature' in Thomas Schultz and Federico Ortino (eds), *Oxford Handbook of International Arbitration* (OUP, forthcoming 2018).

tormenting thrall, and that is where the problems really start. The law is not innocent in pointing us towards one of these two paths.

But the good Duke had in fact only withdrawn to the shadows of another identity for the time required to teach this lesson. And so he can now return to recall the virtues of self-restrained justice. His plot and Shakespeare's play are a *reductio ad absurdum* to show that law's partial ineffectiveness, even if it is criminal law, is indispensable for social harmony.

Then again, the Duke's departure and Angelo's intercession were justified by the need to rein in the city's slackness, which in truth had become excessive. So the lesson, in typical Shakespearean fashion, in typical dialectic perspective, is once again double: no community can survive without some degree of reaffirmation of common rules, of a common law – a common law that should nevertheless be applied in moderation.

Notice, then, the deeper legal theme of the play. It is what appears right on the surface of its title: it is about measure.

Measure, as opposed to Angelo's immeasurable rigour in the application of law, the immeasurable harshness of Claudio's punishment, the immeasurable insistence of Isabella in safeguarding chasteness in the face of her brother's death, the immeasurable cycle of violence which would be caused by a tit-for-tat approach.[106]

Some degree of ineffectiveness in law is required. But it is also inappropriate for law to regulate certain aspects of life. And if it really must, it should not systematically punish transgressions driven by human nature. Then again, it better be a form of ineffectiveness that falls short of the Duke's immeasurable laxness.

In the play, Escalus incarnates that idea. Escalus, whose name evokes scales. Who serves as the Duke's aged and trusted advisor. Who is lauded by the Duke from Act 1 Scene 1. Who is left second in command to Angelo. Whose role is to try to thwart Angelo's over-

[106] Driving tit-for-tat approaches *ad absurdum* is a recurring theme in Shakespearean legal thought: see for instance Kenji Yoshino, 'Revenge as Revenant: Titus Andronicus and the Rule of Law' 21 *Yale Journal of Law & the Humanities* 203 (2009).

determination to a draconian enforcement of the rules. Escalus, who incarnates an Aristotelian model of 'reasonable' justice.[107]

More generally, law is a form of measure in at least four ways. It is a set of measures (rules, sanctions). It is an instrument of measure the way scales are, settings proportions to human relationships. It is the expression of an appropriate middle ground, aiming at an equilibrium and at moderation. And it institutionalizes a weights and measures system for marking the appropriate paces of social relationships, bringing to the surface the variegated types of salient moments in communal life[108] – salient moments which in turn shape law's own identity.[109]

Following from the idea of weights and measures, the play is also about measure in the market or trade sense: is everything tradable, and if so at what price? Isabella's chasteness for Claudio's life? Mariana's body for Isabella's? The idea of prostitution, and its right price if it has any, undergirds the entire play. And again on law's retributive and compensatory role: must there really be pay back for every crime, every harm illegally caused, and if so how is it to be measured?

The play ultimately expresses the need for law to remain humane, that it must acknowledge that it deals with human beings. It must not be a system which is merely content to seek internal perfection and makeshift legitimation in self-injected constitutionalization. Law, lawyers, and legal scholars are there to serve men and women in communal life – not the reverse, where the aesthetic satisfaction of a neatly logical system becomes the altar at which lives are sacrificed. The play denounces our presumptuous folly in seeking law's purity.

All this makes the play particularly suited for educational purposes. Lorenzo Zucca and Lord Judge offer an example of how wonderfully *Measure for Measure* can and has been used as the basis

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[107] Kenji Yoshino, *A Thousand Times More Fair : What Shakespeare's Plays Teach Us About Justice* (Ecco 2011) 64, 80ff; Ian Ward, *Shakespeare and the Legal Imagination* (Butterworths 1999) 85.

[108] François Ost, *Le temps du droit* (O Jacob 1999) 333-4.

[109] Thomas Schultz, 'Life Cycles of International Law as a Noetic Unity: The Various Times of Law-Thinking', in L. Pasquet, K. Polackova Van der Ploeg, and L. Castellanos Jankiewicz (eds), *International Law and Time: Narratives and Techniques* (Springer, forthcoming 2018).

of a mock trial for undergraduate students. As they put it, it is perfect instructional material for students interested in dispute settlement as it allows them to 'pinpoint the values in tension in the real life of the law', to blow on the 'waves that curl the flat, cool covers of the law books.'[110]

Translated into current legal concepts, the play is about proportionality. It thus addresses a particularly significant theme in international dispute settlement, especially in investment arbitration[111] and in WTO law,[112] although proportionality is also more broadly a matter of attention for global governance[113] and international law.[114] But it is important to note the play tells a story about a form of proportionality which is more than simply putting the cursor in the middle of a one-dimensional continuum, a midway point on a one-dimensional measurement. It is not a zero-sum game where one side's gain is necessarily the other side's loss.

It rather is a form of proportionality infused by dialectics, by the idea that the realization of one set of interests can passes over into and be preserved and fulfilled by an opposite set of interests. It is in essence a Hegelian type of the legal principle.[115]

Measure for Measure asks us, then, to be creative in dealing with seemingly opposite values, opposite legal objectives, opposite interests. And it certainly asks us to avoid the immeasure of single-mindedness. For example the single-mindedness of certain investment arbitrators insisting that the world needs a strong hand to protect investors, that investment arbitration is that hand, and the stronger the

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[110] Lorenzo Zucca and Lord Judge, 'Measure for Measure on Trial—A Shakespearean Mock Trial' 9 *Journal of International Dispute Settlement* xxx (2018), xxx [p 1 of PAP]

[111] Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' 4 *Law & Ethics of Human Rights* 48 (2010); Erlend M. Leonhardsen, 'Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration' 3 *Journal of International Dispute Settlement* 95 (2012).

[112] Andrew Mitchell, 'Proportionality and Remedies in WTO Disputes' 17 *European Journal of International Law* 985 (2006).

[113] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' 47 *Columbia Journal of Transnational Law* 72 (2008).

[114] Thomas Franck, 'Proportionality in International Law' 4 *Law & Ethics of Human Rights* 231 (2010).

[115] Milena Korycka-Zirk, 'The Legal Principle of Proportionality in the Light of Hegel's Legal Philosophy' *Hegel-Jahrbuch* 271 (2014).

hand the better.[116] This view effectively turns investment arbitration into one more instrument of the global economic straightjacket that international political economy scholars tend to consider warily.[117] Or the single-mindedness of those who embrace legal certainty unqualifiedly in international dispute settlement, thinking it necessarily is a moral-political positive.[118] But of course also the single-mindedness of those who believe just in the opposite. And, if we keep dialectics in mind, the single-mindedness of those who consider that the right solution is simply somewhere in the middle.

These dialectics, in their intent on creativity and in their elementary grounding in human reasonableness, are perhaps the most fundamental of all logics of life. In law, in theatre, and in many other areas of human thought. Dialectics are possibly law's most important anchor in humanity, allowing law to reach its greatest degree of civilization. The fact that they inscribe themselves as an oxymoronic subtitle to a literal reading of the title's play – the deathly cycle of tit-for-tat, measure-for-measure approaches – is once again very Shakespearean. It is very dialectic.

Conclusion

And so we are back, surreptitiously, to the theme this article began with: we do not want to be able to 'think about something that is inextricably connected with something else, without thinking about the something else'.[119] Be the something and the something else law and the staging of law in theatre. Be they opposed values and objectives within law, as Shakespeare would reveal them to us.

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[116] Thomas Schultz, 'International Arbitration Scholarship: Forms, Determinants, Evolution' in Stavros Brekoulakis, Julian D.M. Lew, and Loukas Mistelis (eds), *The Evolution and Future of International Arbitration* (Kluwer 2016) 436 at 445.

[117] Cédric Dupont, Thomas Schultz, and Merih Angin, 'Double Jeopardy? The Use of Investment Arbitration in Times of Crisis' in Daniel Behn, Ole K. Fauchald, and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP, forthcoming 2018).

[118] Thomas Schultz, 'Against Consistency in Investment Arbitration' in Joost Pauwelyn, Jorge Vinuales, and Zachary Douglas (eds), *The Conceptual Foundations of International Investment Law* (OUP 2014) 297.

[119] Reed cited by Schlag, *Enchantment of Reason*.

But of course to many, the law's profession will lose much of its allure if it cannot be disconnected from 'what is not law', because it loses certainty that way.

Then again, uncertainty precisely is what Shakespearean taught is about. To Lorenzo Zucca, the Bard of Avon simply is the Poet of Uncertainty.[120] To be sure, one of his trademarks is that there always seems to be another interpretation possible of the situations he stages. The readings of the human condition he offers are never unequivocal. The universal laboratories for thought experiments he creates never produce certain findings. (And there even is some uncertainty about the question whether Shakespeare in fact truly wrote all of Shakespeare.) It is precisely the doubts, the insecurity, the indecision expressed in his plays that make the plays reflections of life, and reflections of life of enduring relevance.

And from this a final illustration follows for actors of international dispute settlement, on a point we have already made: the unavoidable need to embrace uncertainty alerts us to the risks of system building in the field. Consider it in contrast to these judges of Nazi Germany, who, when put on trial for applying the Reich's laws, sought defense in the system, in the argument that their highest calling was to get their own sense of justice out of the way in order to pay full respect to the authoritative legal order. To the contrary, it is only in the aggregated expressions of each actor's own sense of justice, uncertain as that combination might be, that overall humanity can be achieved in international dispute settlement. The answer is not – or rather, it is not solely – in the pursuit of a system, of building logical, certain coherence. The answer rather lies in welcoming Shakespearean uncertainty. It lies in the dialectical stories we can convincingly tell.

We cannot be Shakespearean if we cannot accept uncertainty, if we feel we need to close our minds, or other people's minds. Independent thinking and humanity in all its diversity and contradictions are not things to recoil from.

Now should we be Shakespearean to begin with? Shakespearean thought is a legal wave with a 400-year fetch. We might as well ride it, with the insouciance of a secure and adaptable thinker with a good

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[120] Lorenzo Zucca, *Shakespeare: The Poet of Uncertainty*, forthcoming.

balance, confident that it will carry us back onto stable ground, enriched with experiences of reinforced learning.